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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1971

No. ~~1804~~

ARTHUR ROBERTS, by his father and guardian
EDDIE W. ROBERTS PETITIONER

V.

ULYSSES A. SMITH, W. J. LIPSCOMB,
ROBERT H. SWANZY, JAMES D. GREEN
AND JAMES M. HOOPER, JR., individually
and as Members of the Board of Supervisors
of Leflore County, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

OF COUNSEL:
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Greenwood, Miss.

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1971

No. 1894

ARTHUR ROBERTS, by his father and guardian EDDIE W. ROBERTS — PETITIONER

V.

ULYSSES A. SMITH, W. J. LIPSCOMB, ROBERT H. SWANZY, JAMES D. GREEN AND JAMES M. HOOPER, JR., individually and as Members of the Board of Supervisors of Leflore County, — RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTION PRESENTED

Where Supervisors, who constitute the governing Board of a county, have authority by statute to order, and shall establish, proper regulations for the working, guarding, safekeeping, clothing, housekeeping and subsistence of convicts, while so working on the public roads of the county, and provide necessary equipment, and do not order, or establish regulations, are they immune from tort liability under 42 U.S.C. Section 1983, when a prisoner is negligently shot by a trust guard, selected by the Superintendent of a County farm, and armed, he, the trusty guard being inexperienced, and not properly instructed in the use of fire-arms by the Superintendent?

STATEMENT OF THE CASE

The facts of the case are stated fully in the decision of the District Court (Petitioner's Appendix C, p. 40-47.)

The facts of the case, pertaining to the operation of the Leflore County farm, are stated fully in the decision of the District Court (Petitioner's Appendix C, at p. 45-46).

It is submitted that Petitioner in his statement of the case, has either mis-construed, or mis-stated, the facts found by the District Court, and concurred in, and approved by, the Fifth Circuit Court of Appeals. Petitioner, on pages 12 and 13 of his brief, comments at length on the trusty guard system; but what petitioner failed to include, in his statement of facts, was the finding of the District Court that the trusty system, in use at the Leflore County Farm, and in which inmates were used as armed guards, was not harmful, or injurious, to the prisoners' welfare. The District Court found:

"We pretermit a consideration of whether in this modern age the use of inmates as armed guards comports with best prison standards, for it has not been shown that the trusty system is necessarily injurious to prisoner's welfare (Petitioner's Appendix A, at p. 68), a statement concurred in by the Fifth Circuit Court of Appeals, it stating: "The trusty guard system per se was much excoriated in the testimony, and undoubtedly the supervisors must take responsibility for it. However, its use falls, we believe, outside the ambit of a clear breach of a legal duty. At least one other Mississippi County used it, and some other states. There is no evidence to show that in tolerating or approving it, the Supervisors did not act in good faith and exercise their best judgment, how-

ever faulty. **The trier of fact found no proof the system was injurious to prisoners' welfare.** Despite the opinion testimony the most objectionable feature of the system, in actual experience, was the carelessness of trusty guards in allowing prisoners to escape. There was no history of their accidentally shooting prisoners." (Petitioner's Appendix A. p. 30-31.)

Petitioner again mis-states the facts found by the District Court, and concurred in by the Fifth Circuit Court of Appeals, when he states that, "Although the respondent supervisors and defendant Arterbury denied any knowledge of the fact, Columbus Williams appeared to have been a man of violent disposition" (Petitioner's Brief, p. 17), but the District Court found as a fact: "We absolve Arterbury of Plaintiff's charge that Williams was morally unfit to be an armed guard, as we are not convinced that Williams was a person of murderous and malicious instincts." (Petitioner's Appendix C, p. 71-72); a finding approved by the Fifth Circuit Court of Appeals. (Petitioner's Appendix A, p. 4).

Both the District Court and the Fifth Circuit Court of Appeals found, as a matter of fact, that the shooting was **negligently** done rather than **deliberate,** the Fifth Circuit Court of Appeals, concurring, stating: "While concluding that Williams was "patently incompetent" in handling fire arms, the trial judge specifically rejected Plaintiff's suggestion that the shooting was intentional. Williams maintained that it was accidental. **The suggestion, indeed, lacks support in substantial evidence and was inherently incredible.** No reason or adequate motive appears why Williams should commit such a crime, and in plain view of several witnesses, at a time when

Plaintiff, reclining on the ground, offered no shadow of an excuse to fire." (Petitioner's Appendix A, p. 5).

The five supervisors, respondents in this case, are elected by the voters of Leflore County, one supervisor being elected from each district (or beats) and are the governing Board of the County. By law they are vested with a wide range of duties. Among other things, a board of supervisors must set the tax levy for county and other taxing districts, (Sec. 9879 et seq. 9889, Miss. Code 1942); must hear and pass on all applications for homestead exemptions, (Sec. 9732 Miss. Code 1942); must pass upon all applications for industrial tax exemptions, (Sec. 9704 Miss. Code 1942); must equalize tax rolls, (Sec. 9786 Miss. Code 1942); must hear and pass on all objections to assessments, (Sec. 9789 Miss. Code 1942); may acquire and maintain airports, (Sec. 7537 Miss. Code 1942); must select names of jurors to be placed on the jury list to serve in all cases in the circuit court and the county courts of the county, (Chapter 9, Title 10, Miss. Code 1942); must prepare and adopt the county budgets for the operation of the county, (Article 2, Chapter 3, Title 35, Miss. Code 1942); may issue bonds for various county purposes, (Sec. 2926.01 et seq Miss. Code 1942); are required by law to provide for the upkeep of courthouse yard, and to furnish courthouse and all county offices, (Sec. 2896-2897 Miss. Code 1942); may acquire and operate hospitals (Sec. 2999 et seq Miss. Code 1942); may donate to various patriotic and charitable uses, (Sec. 2998 et seq Miss. Code 1942); may establish county health departments (Sec. 2996 et seq Miss. Code 1942); may fill vacancies in county district offices by appointing or calling elections, (Sec. 3292 Miss. Code 1942); members of the Board

are conservators of the peace, (Sec. 2885 Miss. Code 1942) and have full jurisdiction over roads, ferrys and bridges, (Sec. 2890 Miss. Code 1942).

THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT.

Petitioner argues that there is presented an important issue of federal law as to which the federal Courts of Appeal are in conflict and which has not been, but should be, settled by this Court. (Pet. pp. 23). He states the issue is: "Whether a county executive official is immune from personal liability under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. Section 1983, for injury caused by his official conduct which deprives citizens of rights, privileges or immunties secured by the federal Constitution." (Pet. pp. 23).

In **Pierson vs. Ray**, 386 U. S. 547 (1967), the Court held that State judicial officers, acting within their jurisdiction, are immune from liability under Sec. 1983 and "The immunity of legislators for acts within the legislative role was not abolished."

A member of the Board of Supervisors is not a ministerial, but a quasi-judicial officer.

"Leflore County, Mississippi, as are all other counties in the state of Mississippi, is a political division of the state created for convenience, **Brabham vs. Bd. of Supervisors of Hinds County**, 54 Miss. 363. "Board of Supervisors are not mere ministerial agents of the state. They appear in the judiciary articles of the Constitutions of 1832 and 1890, in the first under the name of boards of police "Article 4, Section 20", and in the second under their present names (Sec. 170)

and are charged with duties judicial, legislative, and executive." **State vs. Forbes et al.**, 174 So. 67 (Miss. 1937); and a member of the Board of Supervisors is not a ministerial, but a quasi-judicial officer, **McNulty vs. Vickery et. al.**, 126 Miss. 341, 88 So. 718 (1921)."

Additionally, as found by the District Court, the act to be performed under the Mississippi Statute was a discretionary act as opposed to a mere ministerial duty.

That Court said: "It is unnecessary for us to align ourselves with that view since by the weight of federal authority, Sec. 1983 immunity is granted to a state officer for his failure to perform a discretionary act as opposed to a mere ministerial duty. Immunity for discretionary or quasi-judicial action, although first developed in suits against judges and later prosecutors, has been generally extended to legislative and administrative officials. As previously stated in this opinion, Sec. 1983 did not "abolish wholesale all common law immunities." **Pierson vs. Ray**, 386 U. S. 547, 87, S. Ct. 1213, 18 L. Ed. 2d 288, supra." (Pet. Appendix C., p. 63-64).

The erection and operation of prisons and jails, whether by the state, county or a municipality, is a purely governmental function, being an indispensable part of the administration of the Criminal Law. (41 Am. Jur; Prisons and Prisoners; Sec. 3, p. 886).

This same issue, we submit, was upheld by this Court **when it denied certiorari** in the Case of **Silver vs. Dickson**, 403 F(2d) 642; cer. den; 22 L. Ed (2d) 765, 89 S. Ct. 1477, (1969). In that case, Silver filed suit against thirteen defendants, among whom were members of the California Adult Authority

and certain prison officials. The Court holding the members members of the California Adult Authority immune stated:

> (1) "In our opinion the members of the California Adult Authority and other state officials are, while employed in the processing of applications for parole, performing quasi-judicial functions. They therefore have immunity from suits for damages under the Civil Rights Act, just as do other public employees engaged in the performance of quasi-judicial duties. See **Clark V. State of Washington**, 9 Cir., 366 F. 2d 678 (state bar association in disciplining members of the bar); **Robichaud v. Ronan**, 9 Cir., 351 F. 2d 533 (prosecuting attorney in the performance of an integral part of the judicial process). See also, **Harmon v. Superior Court of State of Cal. et al.**, 9 Cir., 329 F. 2d 154; **Friedman v. Younger**, C. D. Cal., 282 F. Supp. 710, 715-716.
>
> (2) If, however, the work of the California Adult Authority in the area of parole is not a quasi-judicial function, it is at least a governmental function which requires the exercise of discretion and as to which immunity from damage suits under the Civil Rights Act attaches. See **Lang v. Wood**, 67 App. D. C. 287, 92 F. 2d 211. See also, **Hoffman v. Halden**, 9 Cir., 268 F. 2d 280, 300."

As stated by the District Court (Pet. App. C. p. 40), and by the Fifth Circuit Court of Appeals, (Pet. App. A. p. 1), petitioner's suit is a civil action for damages under Section 1983; and we submit, petitioner's suit against these respon-

dents, in their individual capacities, and as members of the Board of Supervisors of Leflore County, Mississippi, is foreclosed by this Court's holdings in **Pierson vs. Ray**, supra, and by its denial of certiorari in the Silver Case, supra. Surely, each respondent, as a duly elected, qualified and acting member of the Board of Supervisors is a quasi-judicial officer; and the operation of the Convict farm by the Board is a pure governmental function which required the exercise of discretion.

Finally, although this contention may go to the merits, no respondent had anything whatsoever to do with the arrest, conviction, sentence or imprisonment of petitioner; and as stated by the District Court (Pet. App. C. p. 66) and approved by the Circuit Court of Appeals (Pet. App. A. p.27), petitioner cannot point to any individual act of a supervisor as having a causal relation to the subject matter of this litigation and the personal injuries sustained by him.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted:

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CERTIFICATE

The undersigned Norman C. Brewer, a member of the firm of Brewer, Deaton & Evans, and Attorney for the respondents, U. A. Smith, W. J. Lipscomb, Robert H. Swanzy, James D. Green and James M. Hooper, Jr., and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the _____ day of July, 1971, I served three copies of the foregoing Brief in Opposition on Raymond W. Conboy, Attorney for Petitioner, 808 Standard Plaza Building, Portland, Oregon, 97204, by air-mail in a duly addressed envelope with postage prepaid.

_____

Norman C. Brewer

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